



4-1-1969

Civil Procedure -- Broadening the Use of Collateral Estoppel -- The Requirement of Mutuality of Parties

Richard F. Mitchell

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Richard F. Mitchell, *Civil Procedure -- Broadening the Use of Collateral Estoppel -- The Requirement of Mutuality of Parties*, 47 N.C. L. REV. 690 (1969).

Available at: <http://scholarship.law.unc.edu/nclr/vol47/iss3/10>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

ship? Or, conversely, would a breach of the implied obligation on the part of the shipowner justify a breach by the stevedore of his warranty? Such questions might be answered by ascertaining who breached his respective warranty first (a question of fact), or whether the initial breach is material or not (a question of law).⁴²

3. If there will be more than one action (and with independent causes of action, such a result is inevitable) what effect will the doctrines of *res judicata* and collateral estoppel have on the second proceeding?

The answers to these problems are not easily found without in some way disturbing settled rules of law; to find a separate cause of action in favor of the stevedore could open a new "Pandora's box," causing more problems than it cured. The Supreme Court, after witnessing the distressing result of its *Sieracki* decision, may tread with more caution in *Burnside*. The fact that a method of recovery already exists within the framework of the Longshoremen's Act should carry great weight. Its provisions would be entirely adequate under normal circumstances.

THOMAS B. ANDERSON, JR.

Civil Procedure—Broadening the Use of Collateral Estoppel— The Requirement of Mutuality of Parties

While driving Northland's car, Mackris collided with Murray and was killed. Northland sued Murray for his negligence and recovered for the damage to the car. Then Mrs. Mackris sued Murray for the wrongful death of her husband, claiming that the judgment in Northland's favor in the first action was conclusive of the issues of liability in the second. The federal district court agreed and gave her summary judgment. In *Mackris v. Murray*,¹ the sixth circuit took a different view and reversed. Although applying Michigan law, the court expressed a strong commitment against such a broad application of *res judicata*.²

⁴² For a brief consideration of this problem, see *id.* at 444.

¹ 397 F.2d 74 (6th Cir. 1968).

² The federal court considered itself at liberty to construct a possible state court decision. The leading case, *Clark v. Naufel*, 238 Mich. 249, 43 N.W.2d 839 (1950), refused to allow the use of collateral estoppel defensively due to lack of mutuality of parties. Other cases, such as *De Polo v. Grieg*, 338 Mich. 703, 62 N.W.2d 441 (1954), admit that the modern rule is *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942), which permits the use of collateral estoppel by a non-party in the first action, but decides the issue on differ-

Mutuality of parties is a legal concept that requires a party, in order to assert the collateral estoppel effect of a judgment, to be bound himself by that judgment.³ In this case, Mrs. Mackris would not have been estopped from litigating had the first action been in Murray's favor: due process considerations prevent closing litigation to one never a party.⁴ Because she was not bound, mutuality would preclude Mrs. Mackris' asserting Northland's judgment against Murray. In the classic case of *Bernhard v. Bank of America National Trust & Savings Association*,⁵ the Supreme Court of California broke through the ancient requirement of mutuality in applying collateral estoppel. There a defendant was permitted to assert a judgment on the identical issues against a party to that earlier action, although the defendant had not been a party.

Because the language used in *Bernhard* was broader than the facts required,⁶ however, courts and legal writers have disagreed over the

ent grounds. The *Mackris* court felt that *Clark* was possibly a stale case. The decision here is that *Bernhard*, even if it were adopted expressly in Michigan, would not go so far as to allow estoppel to cover these facts.

See *Spettigue v. Mahoney*, 445 P.2d 557 (Ariz. Ct. App. 1968), which faced the same problem found in *Mackris* and reached the identical result.

³ Mutuality of parties is not to be confused with the requirement of mutuality of issues. The issues litigated upon and decided in the prior judgment must be identical with the issues of the present suit, now sought to be concluded by collateral estoppel. *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942); *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 170, 105 S.E.2d 655, 657 (1958); F. JAMES, CIVIL PROCEDURE §§ 11.18-21 (1965); cf. *Finlayson v. Cabarrus Bank & Trust Co.*, 181 F. Supp. 838, 850 (M.D.N.C. 1960).

⁴ The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. . . . And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . . , so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918). See *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E.2d 688 (1955).

⁵ 19 Cal. 2d 807, 122 P.2d 892 (1942). In the original action Mrs. Bernhard and others had objected to an accounting filed by Cook, the executor of a decedent's estate. After a hearing on the merits, the accounting was accepted and it was held that certain sums of money had been inter vivos gifts to Cook and were not to be administered. Later Mrs. Bernhard was named successor administratrix, and she sued the bank, who was not a party to the accounting action, to recover the identical sums in dispute in the first suit. The bank was allowed to assert as a defense the original judgment by way of collateral estoppel of the issues of ownership.

⁶ In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the

extent of the repudiation of the mutuality doctrine. In *Mackris* the sixth circuit went to some length to explain why collateral estoppel was not applicable. It distinguished *Bernhard* in one quite important feature. In that case the earlier judgment was asserted *defensively*; in *Mackris* the plaintiff was attempting to assert it *offensively*. This distinction has been a point of conflict. The problem may be described as this: even if collateral estoppel may be asserted defensively by a non-party, is it fair to permit a judgment of liability against a defendant to be conclusive of his liability to all non-parties who have an identical claim against him? Judge O'Sullivan, for the sixth circuit, made the following argument. Suppose the first action filed and tried is a fifty-dollar property damage suit. Defendant's counsel sends his young associate to defend in order to give him trial experience, and he loses. Then another plaintiff sues the same defendant for one hundred thousand dollars for personal injuries, based on the same acts of negligence, and asserts that the fifty-dollar judgment has established liability and that the only issue for trial is damages. Judge O'Sullivan felt that this unfairness would likely result should he affirm the summary judgment.⁷ A more bizarre hypothetical case involves a commercial airliner crash. Numerous death actions are separately filed, and the defendant airline wins ten consecutive trials on the issue of its liability. In the eleventh, however, the airline loses. Is this judgment to be conclusive of liability in favor of all claims yet to be tried?⁸

Several other courts have disagreed with the distinction made in *Mackris*. In a similar accident, one driver recovered five thousand dollars against the other driver for personal injuries. The owner of the car the first plaintiff drove then sued that same defendant for his property loss, 8,250 dollars, and asserted the first judgment, to which it had not been a party, as an estoppel of issues. In *B. R. DeWitt, Inc. v. Hall*,⁹ the New York Court of Appeals affirmed summary judgment for the second plaintiff. The rationale offered by *DeWitt*, similar to that in *Bernhard*,

merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

Id. at 813, 122 P.2d at 895.

⁷ 397 F.2d at 81.

⁸ This hypothetical case originated in Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) [hereinafter cited as Currie], and was used by a California court in *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115-16 (Dist. Ct. App. 1958). The *Nevarov* usage was quoted extensively in *Mackris v. Murray*, 397 F.2d 74, 79-80 (6th Cir. 1968).

⁹ 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967) (a 4-3 decision). See *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194 (1958).

is that when one party has had full opportunity to litigate the issues involved and the judgment is against him, he then has had his day in court and litigation should be closed. Indeed, this is the basic policy in favor of all forms of *res judicata*. Yet it does not seem to outweigh the possible harsh effects noted in the hypothetical situations above.

The question of the offensive assertion of collateral estoppel raises a problem of differing policies. The original rule of absolute mutuality was based on a sense of fair play and abhorrence of unequal advantage, but it has often collapsed before the "day in court" rationale. In the face of the public interest in concluding matters of litigation pursuant to due process of the law, how strong are the arguments in favor of the limitation exemplified in *Mackris*?

A potential multiple defendant, like Murray or the hypothetical airlines, must make tactical decisions in the opening suit. The defendant must plan its defense—specifically the amount of its resources it wishes to pour into obtaining a favorable judgment—in relation to damages claimed, the possibilities of settlement, and the disadvantages of being defendant (reduced options of venue, of court of jurisdiction, and the like).¹⁰ In a case in which the defendant decides not to litigate as forcefully as possible, subsequent use of an adverse judgment as estoppel in another suit could work a severe hardship (*e.g.*, O'Sullivan's hypothetical).¹¹ To the defendant, the important factor regarding any collateral estoppel effect is predictability, the knowledge beforehand whether an adverse judgment will be conclusive in favor of non-parties.¹² In a New York state court or in a Michigan federal court this should now be clear. Yet in a fact situation like *Mackris*, in a jurisdiction that has embraced *Bernhard* without deciding on offensive assertion, the defendant will be strongly tempted to settle the smaller property damage claim if he believes the later personal injury or death suit will go to trial. If his

¹⁰ See Currie 287-88.

¹¹ See *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 149, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 602 (1967) (dissenting opinion), for another possible complication. Because liability insurance is so widespread, actions are often defended by an unjoined insurer, who makes the tactical decisions of the defense. It is possible that the defendant is insured by two different companies. A second action may in effect be against an insurer who was not involved in the first suit (and who was conceivably even without notice of that suit). Assuming the defendant loses the first action, if that action had been for a relatively small property claim, and the second was a large personal injury suit, and two insurers were involved, the injustice is clear.

¹² See *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

appellate court should adopt the *DeWitt* rule, the defendant has a heavy burden to escape liability for the large claim. First, he must successfully defend the initial property suit in order to prevent its offensive use in the subsequent trial. Then he must win the actual litigation with the personal injury claimant. In effect, the defendant must twice convince trial courts of his case, whereas the personal injury claimant has no such burden. A further complicating factor is the possible difference in jury reactions between large personal injury claims and comparatively small property claims. A jury that is untroubled about imposing liability in a five thousand dollar property action might hesitate and consider the issues more seriously in a suit involving hundreds of thousands of dollars, had it the opportunity to decide both claims.

Often as litigation in fact works out, the defendant may have such a tremendous stake in the first suit that considerations of collateral effect of the judgment are incidental. For instance, in *United States v. United Air Lines, Inc.*,¹³ a federal district court allowed the offensive assertion of a prior judgment against the defendant airlines in a crash case. The first suit consolidated twenty-four claims totaling nearly three million dollars. The second suit involved only seven claims; these two suits were the bulk of possible litigation from the crash. The court said that, *in this situation*, the defendant had had a full and fair opportunity to litigate in the first action and had no new evidence to offer; a new trial on the issue of liability would be wasteful.¹⁴ Certainly on these facts it is certain the defendant fought that first suit to its utmost. What then is the principle of the case—that a certain amount of money must be involved before a prior judgment may be offensively asserted? If the defendant needs a rule of predictability, should the appellate court particularize and decide *ex post facto* the estoppel effect of a judgment? The alternatives would seem to be a general rule against any offensive assertion of collateral estoppel, or a rule permitting such an assertion of any judgment, even Judge O'Sullivan's fifty-dollar judgment.¹⁵

¹³ 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.*, *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

¹⁴ It would be a travesty upon that concept [the interest of justice] to now require these plaintiffs who are the survivors of passengers for hire of the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in the 24 consolidated cases tried at Los Angeles. 216 F.2d at 728.

¹⁵ Professor Currie initially suggested an alternative approach to the problem of the offensive assertion of collateral estoppel, based upon who initiated the prior ac-

In defining the law of collateral estoppel, the Supreme Court of North Carolina has been somewhat ambiguous toward the many-faceted problem of mutuality of parties.¹⁶ Our court often has reaffirmed its allegiance to the principle of mutuality,¹⁷ but several cases and their subsequent treatment require close examination, using *Mackris* as an analytic tool, to ascertain the law in this jurisdiction.

In the face of the requirement of mutuality of parties, a 1958 case, *Crosland-Cullen Co. v. Crosland*,¹⁸ created an exception. A corporation was attempting to prove that a life insurance policy made it the beneficiary, but the corporation lost in a suit against the insurer.¹⁹ It then sued the true beneficiary on the same issues. The second defendant was allowed to assert the first judgment against the plaintiff by way of estoppel, because the latter had had a full hearing in the first action and should not be permitted to relitigate, even though the second defendant was not a party to the original action.²⁰ *Crosland* is virtually the same case as *Bernhard*: a party sues *D-1* and loses, then on the same issues sues

tion. His concept was that the previous judgment may be asserted by the one not a party to that action, either offensively or defensively, if the party asserted against was the initiator of that prior litigation. This would protect the defendant subject to multiple claims, but would allow offensive assertions in certain instances. Currie 291-321. Currie subsequently recanted, and endorsed the *United Air Lines* approach. Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1965).

¹⁶ North Carolina has long recognized the privity exception to the requirement of mutuality. If in the first suit *A* sues *X* and loses, and in the second suit *A* sues previously non-party *Y* on the same issues, *Y* may assert *X*'s judgment as collateral estoppel if and only if *Y* is within a certain degree of judicially defined privity with *X*. This exception is quite intricate and beyond the scope of this note. See *Sumner v. Marion*, 272 N.C. 92, 157 S.E.2d 667 (1967); *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962); *Leary v. Virginia-Carolina Joint Stock Land Bank*, 215 N.C. 501, 2 S.E.2d 570 (1939); F. JAMES, CIVIL PROCEDURE §§ 11.31-.33 (1965). Furthermore, in a limited number of situations, courts may consider parties in privity with litigants in the prior action as bound by that judgment to which they themselves were not parties. *Id.* at §§ 11.26-.30. This accounts for the references to privity in notes 4 & 6 *supra*.

¹⁷ *Kleibor v. Rogers*, 265 N.C. 304, 307, 144 S.E.2d 27, 30 (1965); *Shaw v. Eaves*, 262 N.C. 656, 662, 138 S.E.2d 520, 526 (1964); *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962).

¹⁸ 249 N.C. 167, 105 S.E.2d 655 (1958).

¹⁹ *Philadelphia Life Ins. Co. v. Crosland-Cullen Co.*, 234 F.2d 780 (4th Cir. 1956), *rev'd* 133 F. Supp. 473 (W.D.N.C. 1955).

²⁰ It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement. . . . But public policy is equally adamant in its demand for an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred. 249 N.C. at 170, 105 S.E.2d at 657 (citations omitted).

D-2 (not a party in the first action), and is barred by a defensive use of collateral estoppel.²¹

Crosland's status is unclear. It has often been ignored when possibly applicable; in only one case has it been used as a basis for the assertion of collateral estoppel by a non-party.²² On the other hand, many jurisdictions that have recently considered cases in this fairly narrow span of facts have reached the same result as *Bernhard* and *Crosland*.²³ It would not be presumptuous to describe *Bernhard* as the modern, more equitable approach.²⁴

The civil use of criminal convictions presents related problems. It has been generally held that a conviction will not be an estoppel against the convicted party in subsequent civil litigation.²⁵ Application of this rule would ordinarily arise when the convicted is the defendant and conviction is sought to be asserted offensively.²⁶ In a different situation, Taylor was convicted of the crime of willful abandonment and non-support of his wife and children; later he sued her for divorce on the basis of two years' separation. She was allowed to assert his criminal conviction (to which she was obviously not a party) as a bar by estoppel.²⁷ The court based its holding on the *Crosland* case and endorsed its rationale; however, this use of collateral estoppel of a criminal conviction is limited to the situa-

²¹ *Crosland* did not specifically limit its holding to defensive assertions of collateral estoppel, except perhaps by implication. Nor did *Bernhard*. See note 6 *supra*.

Other authorities concur on the specific point that *Crosland* embraces the rule of *Bernhard*. See *Sanderson v. Balfour*, — N.H. —, —, 247 A.2d 185, 187 (1968); *Currie, Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 43 (1965) (appendix); *Survey of North Carolina Case Law: Trial and Appellate Practice*, 37 N.C.L. REV. 463, 470-71 (1959).

²² See notes 27-29 *infra* and accompanying text.

²³ See, e.g., *Tezak v. Cooper*, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); *Lustik v. Rankila*, 269 Minn. 515, 131 N.W.2d 741 (1964); *Sanderson v. Balfour*, — N.H. —, 247 A.2d 185 (1968).

The pre-*Bernhard* rule, requiring mutuality of parties except in the privity situations, is exemplified by RESTATEMENT OF JUDGMENTS § 93 (1942). Of the jurisdictions that have holdings, this still seems to be the majority rule. See *Spettigue v. Mahoney*, 445 P.2d 557, 560 (Ariz. Ct. App. 1968); 30A AM. JUR. *Judgments* §§ 392-93 (1958); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412[1] (1965).

²⁴ Perhaps a cynic might note that the equities are less apparent to appellate courts in personal injury, auto accident cases (see cases at notes 32, 34, & 36) than in non-tort cases (e.g., cases at notes 5, 18, & 27). Cf. *Morgan v. Brooks*, 241 N.C. 527, 532, 85 S.E.2d 869, 872 (1955).

²⁵ 30A AM. JUR. *Judgments* § 473 (1958).

²⁶ Cf., *Durham Bank & Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E.2d 104 (1961). The criminal conviction of the defendant may not even be admitted as evidence of a fact.

²⁷ *Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962).

tion in which the convicted is attempting to benefit from the fruit of his crime.²⁸ As the later case of *Moore v. Young*²⁹ illustrated, this restriction is broader than the *Mackris* restriction to defensive use by a non-party. As the result of an automobile accident, Young was convicted of the involuntary manslaughter of Mrs. Moore. Subsequently Moore sued Young, a claim that was settled, but Young's counterclaim against Moore for his negligence went to trial. Moore attempted to assert Young's conviction against him as conclusive of liability issues, but the supreme court would not permit this. It said that Young's claim was based not upon his own negligence, the "fruits of the crime" for which he was convicted, but rather upon Moore's negligence, a separate element of liability. This judicially defined distinction appears highly artificial. Although Moore's negligence may have contributed to the accident, Young's conviction for manslaughter should certainly be sufficient to establish contributory negligence and thus be an adequate basis for applying the collateral estoppel doctrine.

North Carolina courts have faced other attempts by a non-party to the previous action to assert a prior judgment against an adverse party in the subsequent litigation. Although the use of collateral estoppel is seldom allowed and *Crosland* is rarely discussed,³⁰ most cases may be reconciled with the *Bernhard-Crosland* rule. The frequent attitude of the court is to state that mutuality of parties is required and disregard *Crosland*. A trio of recent cases is illustrative.

An automobile accident caused Gallimore to defend two suits against him. In the first, car owner Stewart recovered a judgment on a verdict that Gallimore was negligent.³¹ In the second,³² Kayler, driver of Stewart's car and not a party in the former suit, attempted to assert Stewart's judgment as conclusive of all issues of Gallimore's liability to him. This was the same basic problem as was found in *Mackris*. Although arriving at the same result, our court handled the case differently. It simply said

²⁸ See *Eagle, Star, & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), noted in Note, 6 N.C.L. REV. 333 (1928). In a suit by the insured to collect for fire loss, insurer may assert as a defense the plaintiff's conviction for intentional burning to defraud the insurer. This is the leading case, and a basis for the decision in *Taylor*.

²⁹ 260 N.C. 654, 133 S.E.2d 510 (1963).

³⁰ See *Shaw v. Eaves*, 262 N.C. 656, 661, 138 S.E.2d 520, 525 (1964), which cited *Crosland*, but used it only to confuse matters.

³¹ *Stewart v. Gallimore*, 265 N.C. 696, 144 S.E.2d 862 (1965).

³² *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E.2d 519 (1967), discussed in *Recent Developments in North Carolina Statutory and Case Law: Civil Procedure*, 47 N.C.L. REV. 262, 272-73 (1968).

that mutuality is required, so that one party cannot assert the estoppel by judgment unless he was himself a party to that prior action. No reference was made to the fact this was an attempted offensive assertion of the judgment, nor to the rule of *Crosland*.³³

A minor sued Rogers for compensation for the injuries he received in an automobile accident. When a judgment was given for the defendant, Kleibor, father of the previous plaintiff, sued Rogers to recover the child's medical costs. The supreme court refused to allow Rogers to assert the previous judgment against Kleibor.³⁴ Kleibor was not a party to the first suit, and should not be bound because that would deprive him of due process. This case then could have been decided on the basis of the constitutional requirement. Although the court noted this, it concentrated on the more technical aspects of mutuality of parties.³⁵

A third case seems contrary to the *Bernhard-Crosland* approach. In successive suits Mr. and Mrs. Sumner each sued Marion for damages arising out of an automobile accident; in each suit Marion counterclaimed for damages. Marion's first counterclaim was nonsuited on the merits, but Mrs. Sumner was not allowed to assert that prior judgment in the later litigation.³⁶ Unfortunately, the only point argued on appeal was whether Mrs. Sumner was entitled to the traditional privity exception to the mutuality requirement.³⁷ In a terse per curiam opinion the court held she was not. The issue of a general defensive assertion of collateral estoppel against a party to the original action by one not a party thereto was not raised.³⁸

These decisions and others like them may leave the *Crosland* holding in jeopardy. On the other hand, the issue may depend on the judiciary's use of language. Chief Justice Traynor of the California Supreme Court, author of the *Bernhard* opinion, later described that holding as the abandonment of the rule of mutuality of estoppel.³⁹ California, nonetheless, still does not seem to allow the offensive assertion of collateral

³³ See also *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E.2d 246 (1967); *Shaw v. Eaves*, 262 N.C. 656, 138 S.E.2d 520 (1964).

³⁴ *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E.2d 27 (1965).

³⁵ For similar cases, see *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E.2d 246 (1967); *Meacham v. Larus & Bros. Co.*, 212 N.C. 646, 194 S.E. 99 (1937).

³⁶ *Sumner v. Marion*, 272 N.C. 92, 157 S.E.2d 667 (1967), discussed in *Recent Developments*, *supra* note 32, at 272-73.

³⁷ Brief for Appellee, *Sumner v. Marion*, 272 N.C. 92, 157 S.E.2d 667 (1967).

³⁸ See also *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962).

³⁹ *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 605, 375 P.2d 439, 440, 25 Cal. Rptr. 559, 560 (1962). This case involved a defensive assertion.

estoppel.⁴⁰ If *Bernhard* and *Crosland* throw out the mutuality requirement, then the frequent reaffirmations of mutuality by the North Carolina Supreme Court must certainly place *Crosland* in grave doubt. Yet in *Crosland* the court restated its adherence to mutuality and characterized that case as an "exception."⁴¹ Whenever an appellate court bases its opinion on a relatively broad rule of law, it is not expected to list all the exceptions to that rule that it happens to recognize, even those arguably relevant. *Crosland* then stands by itself, a wise exception to an ancient rule, but one lamentably often overlooked by the practicing bar and perhaps by the court that wrote it.

The sixth circuit in *Mackris* had to deal with a situation requiring a mature decision based on relevant policy factors. If mutuality of parties were not in every case a prerequisite to the application of collateral estoppel, should it be required in the instance of an offensive assertion? On the one hand is the policy of concluding litigation once a party has had a full and fair opportunity to be heard; on the other, is the concern over placing too heavy a burden upon one party. *Bernhard* demanded one result, but *Mackris* another. The comparable step taken in *Crosland* cannot be overlooked for its significance and should not be ignored as controlling precedent. Rather than applying a simple, broad rule of law in this area, the most equitable result—and collateral estoppel is a product of equity⁴²—may be reached by a closer analysis of the distinction between the offensive and the defensive assertion of the former judgment.

RICHARD F. MITCHELL

⁴⁰ *McDougall v. Palo Alto Unified School Dist.*, 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (Dist. Ct. App. 1963); *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (Dist. Ct. App. 1958). *But cf.* *O'Connor v. O'Leary*, 247 Cal. App. 2d 646, —, 56 Cal. Rptr. 1, 4 (Dist. Ct. App. 1967) (dictum); *Newman v. Larsen*, 225 Cal. App. 2d 22, 36 Cal. Rptr. 883 (Dist. Ct. App. 1964) (offensive assertion of a criminal conviction permitted).

⁴¹ 249 N.C. at 170, 105 S.E.2d at 657. See *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953) (the rules requiring mutuality are "subject to exception").

⁴² *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 692, 79 S.E.2d 167, 175 (1953).